

SCHEDULE 1

FORM 4

**REPUBLIC OF KENYA
PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS
BOARD**

APPEAL NO. 12/2004

BETWEEN

OFFICE TECHNOLOGIES LTD (APPLICANT)

AND

**OFFICE OF THE PRESIDENT (DEPARTMENT OF DEFENCE)
PROCURING ENTITY**

Appeal against the conduct, falsification of evaluation report and preferential award of the tender by the tender committee of the Office of the President, Department of Defense, in the matter of tender No. DOD/423(125) 2003-2004

BOARD MEMBERS PRESENT

Mr. Richard Mwongo - Chairman

Mr. Adam Marjan

Prof. N.D. Nzomo

Eng. D. Njora

Ms. Phyllis Nganga

Kenneth N. Mwangi – Secretary

BOARD'S DECISION ON SUBSTANTIVE APPEAL

Upon hearing the representations of the parties herein and considering all information and documents before it, the Board hereby decides as follows.

Ground 1

The Applicant complained that the Procuring Entity's Tender Committee grossly misconducted itself as it proceeded to award the tender and failed to communicate its award or rejection to the applicant within the stipulated 90 days of opening of the tender documents in blatant breach of Regulation 33(1). The PE did not stipulate the tender validity period in the tender documents, as a result the tenderers stated different tender validity periods. For example, MFI Office Solutions Ltd and the Applicant stated tender validity of 365 and 90 days respectively. Therefore, the PE breached Regulation 24 (2)(1), by failing to indicate the tender validity period. *This ground of complaint that there was a failure to communicate the award within the stipulated time, however, fails.*

Grounds 2 and 7

These grounds were complaints that the tender committee awarded the tender to the successful candidate, but deliberately refused to simultaneously communicate the award decision to the Applicant in breach of regulation 33(1). From the evidence, which is not disputed, the successful tenderer was notified on 17th February 2004 and rendered its acceptance on 18th February 2004. The Applicant and other candidates were notified on 22nd March 2004. The notification of award was defective as it did not comply with Regulation 33(1) which requires that notification must be simultaneous and that no contract may be signed before the expiry of 21 days. The appeal was lodged on 19th March 2004 three days before the applicant had been notified of the award. This clearly indicates that the Procuring Entity failed to comply with Regulation 33. This ground of appeal therefore succeeds.

Ground 3

The Applicant stated that the tender committee failed to award to them, in accordance to the provisions of Regulation 30(8), despite the fact that they had given the lowest prices as publicly declared at the public opening of the tenders. The evaluation report indicates that 3 firms were found responsive and the results were as follows in order of merit:

- a) MFI Office Solutions Ltd.
- b) Office Technologies Ltd.
- c) Davetronic Company

From a perusal of the second schedule of the tender documents, the Applicant gave lower prices than the winning tenderer except in one case.

On average, the applicant's prices were lower than the winning tenderer's prices by 30%. However, there is no evidence that the Applicant was the lowest evaluated tenderer. The evaluation process was subjective and was thus incapable of leading to an evaluation on a like-for-like basis to establish the best/lowest evaluated tender. This subjective evaluation was not in accordance with the purpose of Regulation 4 which seeks to promote economy and efficiency, and was not capable of resulting in the lowest evaluated tender. In this respect the PE failed to comply with Regulation 30(8). This ground of appeal succeeds.

Ground 4

The Applicant has alleged that the PE corruptly and preferentially awarded the tender to MFI Office Solutions Ltd, a company that was unqualified to participate in public tenders due to its failure to remit tax returns. This was allegedly in breach of Regulation 13(1)(d) and section 17 of the Public Officer Ethics Act, 2003. The Board noted that the Applicant did not prove that there was corruption in the tender award, and that enforcement of the Public Officers Ethics Act is not within the Board's jurisdiction. The Applicant's argument that the Daily Nation newspaper article of 20th August 2003 proved that MFI Office Solutions Ltd. was not qualified to participate in public procurement was not based on credible evidence of breach of the Regulations. All that the Newspaper report showed was that there was a tax dispute between the Kenya Revenue Authority and the Interested Candidate. The Interested Candidate, MFI, nevertheless presented a tax compliance certificate to the PE on 3rd March 2004 which showed that it was tax compliant. The Interested Candidate argued that such certificates were not previously available from the Kenya Revenue Authority until this year. This ground of appeal therefore fails for lack of proof.

Ground 5

The Applicant complained that the Procuring Entity corruptly and maliciously falsified information that the Applicant did not have any established offices, in order to deny them the award of the tender in breach of section 19 of the Public Officer Ethics Act 2003 and Regulation 16. The allegation of corruption by the Applicant was not proved. The affidavit of Mr. Philip Mutungi, an officer of the Applicant, deponing that the technical evaluation committee had reported that the Applicant did not have established offices and hence could not be awarded the tender, proved that the Applicant breached regulation 31(2) which requires that the tenderer should not solicit information from the Procuring Entity until the award of the contract. This ground of appeal therefore fails. In

this regard, the Board would issue a strong reprimand to Mr. P Mutungi for making unsolicited communication to the PE. At the same time as crying "foul and corruption" he was himself breaching the cardinal principle of confidentiality in procurement. He had dirty hands himself and should not be heard calling the Procuring Entity dirty.

Ground 6

This was a complaint that the criteria for disqualification of the Applicant's tender were not in accordance with the criteria set forth in the tender documents which is contrary to Regulation 30(7). The Board noted that there were no pre-determined evaluation criteria in the tender documents. In this regard, the Procuring Entity breached Regulation 30(7). Even the evaluation criteria purportedly used by the Procuring Entity were wholly subjective, and thus were incapable of assisting in ranking the tenders effectively. This ground of appeal therefore succeeds.

Ground 8

This ground is a complaint that the Applicant was unjustly denied the tender and has suffered loss equivalent to the value of the tender of Kshs. 1,471,000, plus costs of these proceedings. This is a statement of loss or damage to the Applicant in terms of Regulation 42(2), and not a ground of appeal requiring determination.

GROUNDS OF OPPOSITION

MFI Office Solutions Ltd, an interested candidate, being the successful tenderer in this appeal presented the following grounds which the Board addresses as follows.

Ground 1.1, 1.2 and 1.3 have been covered by the Board's decision under ground 5 of the Applicant's Memorandum of Appeal and dealt with in this decision.

Ground 2 to 4.3 have been covered in the Board's ruling on the preliminary objection earlier read.

Grounds 6 is covered by the Board's decision at grounds 3

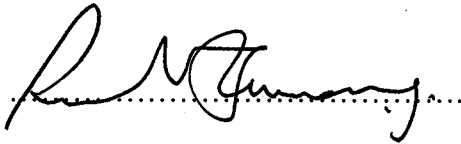
Grounds 7.1, 7.2 and 7.3 are covered in ground 4 of Board's decision.

In ground 8.1 and 8.2 no specific breach of the regulation is stated to have been breached.

Conclusion

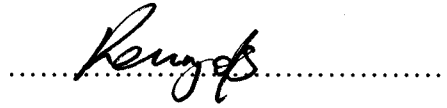
In our view this appeal succeeds, and we hereby annul the decision of the Procuring Entity to award to MFI Office Solutions Ltd. However, the LPO of Kshs 36,971 issued to MFI, should be honoured to avoid loss of public funds should performance have commenced. The Procuring Entity is reprimanded for issuing irregular Local Service Orders, and should desist from doing so in future. The Procuring Entity is also ordered to re-advertise this tender and process the procurement strictly in accordance with the Public Procurement Regulations under the guidance of the Public Procurement Directorate.

Dated 9th April, 2004



CHAIRMAN

PPCRAB



SECRETARY

PPCRAB